LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 20 1971
E. ROBERT SEAVER, CLERK

No. 71 - 104

In the

Supreme Court of the United States

OCTOBER TERM, 1971

IN THE MATTER OF:

Petition for F. J. REILLY for review of an Order of the NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. HARTE
111 West Washington Street
Chicago, Illinois 60602
Attorney for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

SUBJECT INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement of the case	3
Reasons for granting the writ	5
Conclusion	9
Appendices:	
A. Opinion of the United States Court of Appeals	1a
B. Opinion of the United States District Court	5a
C. Award of the Railroad Adjustment Board First Division	8a

TABLE OF AUTHORITIES CITED

CASES

Barnett v. Pennsylvania-Reading Seashore Lines, 245 F. 2d 579, (3rd Cir. 1957)	5
Beatty v. United States, 191 F. 2d 317 (8th Cir. 1951)	7
Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, 370 F. 2d 833 (10th Cir. 1967)	4, 8
Hanson v. Chesapeake and Ohio Railroad Company, 291 F. Supp. 401 (S.D. W.Va. 1968)	4, 8
Orlicki v. McCarthy, 4 Ill. 2d 342, 347-8, 122 N.E. 2d 513 (1954)	7, 8, 9

PAGE

United States v. Fullerton, 87 F. Supp. 359 (D. Mass. 1949) 7

United States v. Gianoulis, 183 F.2d 378 (3rd Cir. 1950) 7

United States v. Mitchell, 86 F. Supp. 453 (W.D. Mo. 1949) 7

STATUTES

45 U.S.C. Sec. 153 First 2, 3, 4, 6

MISCELLANEOUS

U.S. Code, Cong. Adm. News, 1966, p. 2287 ..... 5, 6, 8

Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 N.W. L. Rev. 540, 551-553 (1956) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No.

IN THE MATTER OF:

Petition for F. J. REILLY for review of an Order of the NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner F. J. Reilly prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on April 22, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals below is reproduced in Appendix "A" *infra*. This opinion is reported at 442 F.2d 26. The opinion of the District Court is reproduced in Appendix "B" *infra*. This opinion is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1971. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the remedial provisions of the 1966 Amendments to the Railway Labor Act, for the first time authorizing judicial review, may be applied retroactively to permit judicial review of an adverse decision of the Railway Adjustment Board which was rendered before the 1966 amendments were enacted.

STATUTES INVOLVED

The portion of the statute upon which petitioners claim is based is 45 U.S.C. § 153 First, paragraph (q). That paragraph provides as follows:

> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct.

On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

STATEMENT OF THE CASE

Petitioner is a yard-brakeman who was employed by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company of the New York Central System (succeeded by Penn-Central Company). Petitioner alleges that he was wrongfully discharged by said company after a minor dispute arising out of his employment. Petitioner sought certain time off for a personal urgency, which was refused. He was specifically charged by the carrier with being absent from duty on one day and was suspended for 30 days and later discharged for the same offense. A claim was filed with the National Railroad Adjustment Board—First Division ("Adjustment Board"), seeking reinstatement without impairment of seniority and pay for accumulated lost time. The National Railroad Adjustment Board—First Division, dismissed his claim without reaching the merits on October 6, 1955. (Appendix C, *infra*)

In this case petitioner contends that the law (Railway Labor Act) at that time did not authorize judicial review from adverse decisions of the Adjustment Board. The Railway Labor Act was subsequently amended, effective June 20, 1966, and now authorizes an employee to file a

petition for review in a United States District Court. 45 U.S.C. 153, First (q). The act provides that:

> "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the Division of the Adjustment Board."

Petitioner filed his petition for review under the act, on June 18, 1968, which was within two years after the enactment of the new sub-section (q) of the Act, but which was more than two years after the adverse decision of the Adjustment Board. Petitioner contends that the two year limitation period for the commencement of any action under present sub-section (q) must commence with the effective date of the sub-section, June 20, 1966. The District Court held that the 1966 Amendments could not be applied retroactively, stating: "Since there is no evidence of any Congressional intention to give Sub-section (q) retroactive application, it is the opinion of this court that judicial review is not available to petitioner." (App. B, 6-a).

The Court of Appeals affirmed, stating: "We feel that the District Court correctly stated the law in holding that amendatory statutes generally operate prospectively only absent a strong indication of legislative intent to the contrary." (App. A, 3-a). The Court found no such intent expressed by Congress and therefore denied retroactive application to petitioner's claim, although it acknowledged that other Courts had granted retroactive application to this same provision. *Brotherhood of Railroad Trainmen* v. *Denver & Rio Grande Railroad Company,* 370 F.2d 833 (10 Cir. 1967), and *Hanson* v. *Chesapeake and Ohio Railroad Company,* 291 F. Supp. 401 (S.D.W. Va. 1968). These cases were distinguished on the basis that the claims in those cases were still pending when the 1966 amendments were passed. (App. A, 4-a)

Petitioner now seeks certiorari to review the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The possibility of prospective application of the statute in question has never been before this Court. Petitioner is in the precise circumstances that Congress intended to remedy by enactment of the 1966 amendments.

Petitioner was involved in a minor dispute with his employer and was discharged. Petitioner filed a claim with the Railroad Adjustment Board under the Railway Labor Act, but his claim was dismissed (App. C *infra*). Petitioner stresses the fact that there has never been any consideration of the merits of his claim by any Board or Court. At the time of that dismissal (October, 1955), awards of the Adjustment Board were final, "except insofar as they shall contain a money award." 45 U.S.C. §153, First (m). Under another Subsection, Paragraph (p), of the prior law, provision was made for Court enforcement of awards rendered in favor of employees. There was no other provision for judicial review of decisions of the Adjustment Board. In other words, if an employee was successful in obtaining an award before the Board, the Carrier could obtain judicial review of that decision by refusing to comply and thus compelling the employee to go to Court to enforce his award. When his claim failed before the Board, however, there was no opportunity for Court review. See *Barnett* v. *Pennsylvania-Reading Seashore Lines,* 245 F.2d 579 (3rd Cir., 1957). The inequity of the prior law is described in the United States Senate Report explaining the proposed 1966 amendments. As stated in the Legislative History:

> "This results in the incongruous situation that if an employee receives an award in his favor from the

> Board, the railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review might be obtained. The committee believes that this result is unfair to employees and that an equal opportunity for judicial review should be provided under the act." (1966 U.S. Code, Cong. Adm. News, p. 2287).

To provide that "equal opportunity for judicial review", a new paragraph was added to § 153 First. That paragraph provides in substance that any employee or carrier aggrieved by the failure of the Adjustment Board to make an award in a dispute or aggrieved by the terms of the award, may petition for a review of that order in a United States District Court. 45 U.S.C. § 153 First, Par. (q).

Parenthetically, the review provided is quite limited. The findings of the Board are conclusive on the parties and the order may be set aside or remanded only if the Adjustment Board (1) failed to comply with the requirements of the Act; (2) failed to conform or confine itself to matters within the scope of its jurisdiction; or (3) for fraud or corruption by a member of the division making the order. 45 U.S.C. § 153, First (q). Petitioner has alleged that this was such a case, most specifically, that the Board failed to comply with the requirements of the Act.

The District Court reviewed this history of the Act, but nevertheless concluded that no retroactive application of the 1966 amendments was intended by Congress. Accordingly, it held that "judicial review is not available to petitioner."

The Court of Appeals affirmed. Both Courts relied on the general rule of construction that statutes are not to be

given retroactive application unless such application is clearly intended by the legislature. Petitioner respectfully submits, however, that this rule of construction has no application where, as here, the new statute merely relates to procedures or remedies. Rather, when Congress enacts remedial legislation which does not destroy or interfere with a vested right, but which only provides new procedural remedies, the legislation should be given retroactive application. See *Beatty* v. *United States,* 191 F. 2d 317, 320 (8th Cir. 1951); *United States* v. *Gianoulis,* 183 F. 2d 378, 379 (3rd. Cir. 1950); *United States* v. *Fullerton,* 87 F. Supp. 359 (D. Mass. 1949); *United States* v. *Mitchell,* 86 F. Supp. 453 (W.D. Mo. 1949). See also Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 N.W.L. Rev. 540, 551-553 (1956).

The Court of Appeals expressed agreement with the general proposition that "procedural" statutes should be given retroactive application, but disagreed with petitioner's claim that the 1966 amendments were "procedural only". The Court of Appeals observed, "The amendment created substantial changes in the earlier procedures and, if giving retroactive effect, would have a substantial effect on the earlier action of the Adjustment Board." (App. A, 3-a).

Petitioner respectfully submits that the amendments would have no "substantial effect on the earlier action of the Adjustment Board," but would merely permit a judicial review of that action. In establishing this review the amendments are procedural only. They were intended to equalize the procedural opportunities for judicial review. The substantive rights and obligations of the parties under their bargaining agreements and under the law remained the same. Accordingly, they should be applied retroactively. See particularly, *Orlicki* v. *McCarthy,* 4 Ill. 2d

342, 122 N.E. 2d 513 (1954), an opinion of the Supreme Court of Illinois containing an excellent analysis of the entire subject of retroactive application of legislation.

The 1966 amendments to the Railway Labor Act, "pertain to the remedy" or "to the course and form of proceedings for the enforcement of a right". It is a remedial statute and should be construed, "to further its life in advancing the remedy and striking down the mischief",[1] *i.e.*, the incongruous and inequitable situation which authorized judicial review for the railroad, but denied it to the aggrieved employee. (See Legislative History, 1966 Cong. & Adm. News, p. 2287).

Petitioner stresses to this Court, that the 1966 amendment, specifically sub-section (q), has been given retroactive effect by other Courts. See *Brotherhood of Railroad Trainmen* v. *Denver and Rio Grande Western Railroad Company,* 370 F. 2d 833 (10th Cir. 1967); *Hanson* v. *Chesapeake and Ohio Railroad Company,* 291 F. Supp. 401 (S.D. W. Va. 1968).

The Court of Appeals distinguished these cases on the basis that those decisions dealt with cases "which were still pending when the 1966 amendments were passed." (App. A, 4-a). There is no validity to this distinction. As correctly observed by the Illinois Court in the *Orlicki* opinion, *supra:*

> "Where the change in law merely affects the remedy, or the law of procedure, all rights of action will be enforced under the new procedure without regard to whether they accrued before or after such change of

[1] *Orlicki* v. *McCarthy,* 4 Ill. 2d 342, 354, 122 N.E. 2d 513, 519 (1954).

law, *and without regard to whether suit has been instituted or not. . .*" (Emphasis supplied) (4 Ill. 2d at 347-8, 122 N.E. 2d at 516)

CONCLUSION

For the foregoing reasons petitioner submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM J. HARTE
111 W. Washington Street
Chicago, Illinois 60602
Attorney for Petitioner

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 18461 SEPTEMBER TERM 1970 — JANUARY SESSION 1971

IN THE MATTER OF Petition for F. J. REILLY for Review of an Order of the National Railroad Adjustment Board, First Division.	Appeal from the United States District Court for the Eastern District of Illinois.

April 22, 1971

Before DUFFY, *Senior Circuit Judge*, FAIRCHILD, *Circuit Judge* and GRANT, *District Judge*.[1]

DUFFY, *Senior Circuit Judge*. This suit was brought in the District Court on petitioner-appellant's petition for a review of an order issued by the National Railroad Adjustment Board. The District Court granted respondent's motion to dismiss. We affirm.

Petitioner was a yard-brakeman who was employed by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company of the New York Central System.

On October 21, 1953, petitioner F. J. Reilly, filed a claim with the National Railroad Adjustment Board, First Divi-

[1] Judge Grant is sitting by designation.

sion, seeking a reinstatement without impairment of seniority and pay for accumulated lost time.

Petitioner alleges he was wrongfully discharged by his employer after a minor dispute arising out of his employment. He requested of his employer that he be off duty for a five to seven day period commencing October 5, 1952. This request was denied. Petitioner did not report for work during that period. Petitioner was notified of an investigation to be held October 15, 1952 to determine the cause of his absence from duty. He later was notified that he had been suspended for a thirty-day period. Another investigation was held, and he was ordered discharged on December 5, 1952. Another order of discharge for the same offense was entered on April 27, 1953.

The decision of the First Division of the National Railroad Adjustment Board dated June 6, 1955, stated that since the "Time Limit Rule was not complied with", the claim must be dismissed. It was also stated that "hearing was waived." In addition, it appears that the merits of the claim, along with supporting evidence, were briefed for the Board, as was usual in such cases.

At the time of the Board's decision, the National Railway Labor Act allowed judicial review only of decisions which included a monetary award. Cases such as petitioner's in which no monetary award was given were "final" under the Act.

Effective June 20, 1966, the Railway Labor Act was amended and now authorizes an employee to file a petition for review in a United States District Court in certain limited situations, even though no monetary award had been granted. The Act provides: "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the Division of the Adjustment Board, and not after." 45 U.S.C. § 153.

Petitioner filed his petition for review under the Act on June 18, 1968 which was within two years after the enact-

ment of the new subsection (q) of the Act, but it was more than two years after the adverse decision of the Adjustment Board.

Respondent contends that the June 20, 1966 amendments cannot be applied retroactively. The District Court agreed in substance with the position taken by respondent and concluded "Since there is no evidence of any Congressional intention to give subsection (q) retroactive application, it is the opinion of this Court that judicial review is not available to petitioner."

The principal issue before us is whether the remedial provisions of the 1966 amendments to the Railway Labor Act, which for the first time authorizes a judicial review, may be applied retroactively to permit a judicial review of an adverse decision of the Railroad Adjustment Board which was rendered prior to the time the 1966 amendments were enacted.

We feel that the District Court correctly stated the law in holding that amendatory statutes generally operate prospectively only absent a strong indication of legislative intent to the contrary. We note here that the Legislative History accompanying the 1966 amendment is silent on the question of Congress' intent on this matter. 1966 U.S. Code Cong. and Admin. News, p. 2285 et. seq. And we also note that this amendment, dealing as it does with the right to appeal, might arguably be considered "relating merely to the remedies and forms of procedures." But that does not answer the entire question.

The amendment created substantial changes in the earlier procedures and, if given retroactive effect, would have a substantial effect on the earlier action of the Adjustment Board. As was stated in *Aetna Casualty and Surety Company* v. *Industrial Accident Commission*, 182 P.2nd 159 — "If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed,

and the statute will be construed to operated only in futoro unless the legislative intent to the contrary clearly appears." Quoted also in *Koster* v. *Warren*, 297 F.2d 418 (1961).

We disagree with the claim of petitioner that the 1955 dismissal by the Adjustment Board was not a final judgment for our purposes. Although the stated reason for dismissal was that the "Time Limit Rule was not complied with," it appears also that the merits of the claim were fully briefed for the Board and that a hearing was waived. Moreover, the central point is that the matter, as of the time of the Board's action, was closed and became final. Thus any action which we might take would be interfering with that final judgment.

For that reason our case differs sharply from *Brotherhood of Railroad Trainmen* v. *Denver and Rio Grande Railroad Company*, 370 F.2d 833 (10 Cir., 1967) and *Hanson* v. *Chesapeake and Ohio Railroad Company*, 291 F. Supp. 401 (S.D.W.Va. 1968) which are cited by petitioner. In both of those cases, retroactive effect was given to the 1966 amendment, but they both dealt with cases which were still pending when the 1966 amendments were passed. Both courts took pains to point out that it was only to still pending matters that the amendment would be given retroactive effect.

Since we have decided that the 1966 amendment will not be applied retroactively to petitioner's claim, we need not determine whether he stated a claim under the Statute.

The judgment dismissing this petitioner's suit is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

• • (Caption—CV. No. 68-74-D) • •

ORDER GRANTING MOTION TO DISMISS
(Filed February 27, 1970)

Motion to dismiss petition for review having come on for hearing, briefs submitted, oral argument heard, and the court being fully advised in the premises finds that said motion should be granted.

On October 6, 1955 the National Railroad Adjustment Board dismissed petitioner's claim for reinstatement of his job assignment without impairment of seniority and for payment for all accumulated lost time. The petition for review in the instant case was filed on June 18, 1968 pursuant to Section 152(q) of the Railway Labor Act (45 U.S.C. Section 153(q)). Subsection (q) was added to an amendment to Section 153 of the Railway Labor Act, effective June 20, 1966, and for the first time authorized an employee to file a petition for review in a United States district court contesting the failure of the National Railroad Adjustment Board to make an award in a dispute referred to it. The issue presented for determination by this court is whether Section 153(q) of the amended Railway Labor Act can be applied retroactively to permit judicial review of the petition in the instant case.

Prior to June 20, 1966 the statute of limitations on actions filed under Section 153 of the Railway Labor Act read as follows:

> "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after." 45 U.S.C. Section 153(q).

When the present Section 153(q) became effective on June 20, 1966, the cited statute of limitations was renumbered as Section 153(r), but the language of said statute of limitations was not changed. Petitioner contends that the two year limitation period on the commencement of proceedings under present Section 153(q) became operative on the effective date of said subsection (June 20, 1966). Under such a construction, petitioner asserts that the June 18, 1968 filing date of the petition in the instant case would fall within the two year limitation. On the other hand, respondent contends that the June 20, 1966 amendment cannot be applied retroactively to permit judicial review of a decision made by the Adjustment Board over ten years prior to said amendment.

The question of whether a statute operates retroactively or prospectively only is one of legislative intent. Amendatory acts, such as the one in the instant case, are generally prospective in operation and will be so construed unless a contrary legislative intent, either express or implied, is clearly shown. Brewster v. Gage, 280 U.S. 327 (1930); Koster v. Warren, 297 F. 2d 418 (9 Cir. 1961); New York Life Ins. Co., v. Murphy, 388 Ill. 316 (1944); 34 Ill. L.P., Statutes Section 195. In the instant case, the statute in question is silent as to whether Section 153 (q) is intended by Congress to be applied retroactively. Furthermore, an examination of the legislative history of the June 20, 1966 amendment to Section 153 of the Railway Labor Act gives no indication of any intention on the part of Congress to give Section 153(q) retroactive effect. 1966 U.S. Code Cong. & Adm. News, p. 2285 et seq. Since there is no evidence of any Congressional intention to give Section 153(q) retroactive application, it is the opinion of this court that judicial review is not available to petitioner.

Even if amended Section 153(q) of the Railway Labor Act does apply retroactively and the two year statute of limitations does not bar judicial review in the instant case, it is the opinion of this court that petitioner has failed to state a claim for relief. Subsection (q) of Section 153

grants United States district courts only limited power of review over decisions of the National Railroad Adjustment Board. Review is authorized in only three instances: when the Adjustment Board fails to comply with the requirements of the Railway Labor Act; when the Adjustment Board fails to confine itself to matters within the scope of its jurisdiction; or when a member of the Adjustment Board is guilty of fraud or corruption. 45 U.S.C. Section 153(q). An examination of the pleadings in the instant case and the record of proceedings before the Adjustment Board shows no evidence that the Adjustment Board committed any of the types of reviewable error enumerated in Section 153(q), and for that reason petitioner is precluded from obtaining judicial relief in the instant case.

It Is Therefore Ordered that the motion to dismiss the petition for review be, and is hereby, granted, and the petition for review is dismissed.

Entered this 27th day of February, 1970.

/s/ Henry S. Wise
United States District Judge

APPENDIX C

Award 17167
Docket 32746

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
39 South La Salle Street, Chicago 3, Illinois

PARTIES TO DISPUTE:
BROTHERHOOD OF RAILROAD TRAINMEN
CLEVELAND, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of Yard Brakeman F. J. Reilly, that he be reinstated to his assignment without impairment of seniority, and be paid for all accumulated time lost. Discharged for alleged violation of Operating Rule 725. Notification of being dismissed: December 5, 1952 (effective December 9, 1952) and April 27, 1953."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Respondent carrier contends that this dispute was not handled in accordance with the provisions of the Time Limit Rule of the agreement and which contention is fully supported by the record.

Petitioner in his rebuttal statement asserts:

> "The Carrier declares, AND THE CLAIMANT DOES NOT DENY, that the first formal appeal, was made under date of October 21, 1953."

Therefore, it being conclusive that the Time Limit Rule was not complied with, this claim must be dismissed.

AWARD: Claim dismissed.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of FIRST DIVISION
ATTEST: (Signed) J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 6th day of October, 1955.

Champlin-Shealy Co., Chicago, Ill. Printed in U.S.A.

LIBRARY
SUPREME COURT, U. S.

No. 71-104

Supreme Court, U.S.
FILED
AUG 14 1971
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1971

IN THE MATTER OF:

Petition for F. J. REILLY for review of an Order of the NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION

BRIEF OF PENN CENTRAL TRANSPORTATION COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HORACE E. GUNN
8 East Harrison Street
Danville, Illinois 61832
Attorney for Respondent

The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

TABLE OF CONTENTS

	PAGE
Table of Cases, Statutes and Other Authorities Cited	i
Statement of the Case	1
Argument	2
Conclusion	9

TABLE OF CASES AND OTHER AUTHORITIES

Arnold & Murdock Co. v. Industrial Commission, 314 Ill. 251 (1924)	3
Brotherhood of Railroad Trainmen v. Denver and R.G.W.R. Co., 370 Fed. 2d 833 (10th Cir. 1966)	5
Brotherhood of Railway Trainmen v. Chicago R.&I.R. Co., 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622	2
16 C.J.S., Constitutional Law, Section 89, 263	8
Edwards v. St. Louis-San Francisco Railroad Company, 361 Fed. 2d 946 (7th Cir. 1966)	6
Ellerd v. Southern Pacific Railroad Company, 241 Fed. 2d 541 (7th Cir. 1957)	7
Gordon v. Eastern Airlines, Inc., 268 Fed. Supp. 210 (W.D., Va. 1967)	8
Gunther v. San Diego and Arizona Eastern Railway Co., 382 U.S. 257, 86 S. Ct. 368, 15 L. Ed. 2d 308 (1965)	3
Hanson v. Chesapeake and Ohio Railroad Company, 291 Fed. Supp. 401 (S.D. West Virginia 1968)	5
Hogan v. Bleeker, 29 Ill. App. 2d 181 (1963)	4
Hoyt Metal Co. v. Atwood, 289 F. 453 (7th Cir. 1923)	2
Orlicki v. McCarthy, 4 Ill. 2d 342	4

PAGE

People ex rel. Allied Bridge and Construction Co. v. McKibbin, 380 Ill. 63, 66 (1942) 3

United States v. Magnolia Petroleum Company, 276 U.S. 160, 48 S. Ct. 236, 72 L. Ed. 509 5

U.S. v. Ruppel, 6 Fed. Supp. 346 (S.D. Ill. 1934) 4

45 USCA Sec. 153 (q), (m), (r) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-104

IN THE MATTER OF:

Petition for F. J. REILLY for review of an Order of the NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION

BRIEF OF PENN CENTRAL TRANSPORTATION COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

Penn Central Transportation Company is successor in interest to Cleveland, Cincinnati, Chicago and St. Louis Railway Company, petitioner's former employer.

The award of the First Division of the National Railroad Adjustment Board was reached on the merits since the *ex parte* submission, as the Circuit Court of Appeals noted (Appendix A, 2a, 4a), did contain the evidence and argument on petitioner's version of his claim as was usual in such submissions.

Further hearing was "waived" (Award, National Railroad Adjustment Board, Appendix C, 8a).

ARGUMENT

I. THE 1955 AWARD HAD THE EFFECT OF A FINAL JUDGMENT AND THE 1966 AMENDMENT MAY NOT BE GIVEN RETROACTIVE APPLICATION.

It was stated in *Hoyt Metal Co.* v. *Atwood,* 289 F. 453 (7th Cir. 1923), at page 455, by reference with approval to 6 R.C.L. that:

> "A judgment is such a vested right of property that the Legislature cannot be a retroactive law either destroy or diminish its value in any respect."

That case involved a judgment for plaintiff's damages through lead poisoning in the amount of $7,000.00. After judgment, the Occupational Disease Law was amended to provide that such an employee should receive compensation under the Workmen's Compensation Act. This would have reduced the award to $3,500.00 and would have compelled a new proceeding. At page 455, the Court said:

> "The statute in question, though purporting to affect only the remedy, in reality impairs the value of a right. Though it may be true that parties to actions have no vested right in rules of procedure, and the latter may be changed at will by the Legislature, without affecting the right, yet if statutes, professing only to affect procedure or remedy, do in fact thereby affect or impair the right, they are void or inapplicable as against the enforcement of the right thus impaired."

"Minor" disputes under the Railway Labor Act are controversies ". . . over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee". *Brother-*

hood of Railway Trainmen v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 at pages 625 of the L, Ed. citation. At page 628 of the L. Ed. citation, the Court said:

> "This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history."

This case was referred to by the Supreme Court in *Gunther* v. *San Diego and Arizona Eastern Railway Co.*, 382 U.S. 257, 86 S. Ct. 368, 15 L. Ed. 2d 308 (1965). At page 312 of the L. Ed. citation, the Supreme Court said:

> "This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board."

Since the award had the same finality as a decision of arbitrators would have, it, of course, had the force and effect of a judgment. Such rights may not be diminished, enlarged or adversely affected by subsequent legislation. *People ex rel. Allied Bridge and Construction Co.* v. *McKibbin*, 380 Ill. 63, 66 (1942).

In *Arnold & Murdock Co.* v. *Industrial Commission*, 314 Ill. 251 (1924), an Industrial Commission award for total disability and a pension for life had been affirmed by Circuit and Supreme Courts. It was sought to diminish the award by petition alleging that the disability had decreased or ended and that an amendment enacted subsequent to the award required this reduction. In denying this contention, the Court, pages 254-255, said:

> "No one has a vested right in a public law, but the legislature may repeal or amend all legislative acts not in the nature of contracts or private grants. Such repeal or amendment, however, cannot have the effect of extinguishing rights which have been acquired under the law."

In this situation, the case of *Orlicki* v. *McCarthy*, 4 Ill. 2d 342, relied upon by petitioner, was distinguished in *Hogan* v. *Bleeker*, 29 Ill. App. 2d 181 (1963), where the Court, page 187, said this:

> "However, even procedural or remedial statutes are not construed retroactively where to do so would deprive one of a vested property right. "'Remedies are the life of rights, and are equally protected by the constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away.'" (*Board of Education* v. *Blodgett*, 155 Ill. 441)."

See also *U.S.* v. *Ruppel*, 6 F. Supp. 346 (S.D. Ill. 1934) where it was stated, page 347:

> "The general rule with reference to a final judgment in both civil and criminal cases seems to be that no act of a legislative body can affect a valid subsisting judgment."

Petitioner cites two cases (Petition, 4, 8), in which it is said that the 1966 amendment was given retroactive effect. The decisive factor, however, in each of these cases was that the proceedings to enforce or review the awards of the Railroad Adjustment Board were *pending* at the time of the amendment. In *Hanson* v. *Chesapeake and Ohio Railroad Company*, 291 Fed. Supp. 401 (S.D. West Virgina 1968) at page 405 in footnote 1, the Court said:

> "As to the question of the applicability of an amended statute with respect to cases *pending but not disposed of* at the time of the amendment, the Supreme Court has consistently held that an intervening statutory change, particularly one affecting jurisdiction, is applicable." (Emphasis supplied).

The present case was not "pending" in 1966 at the time of the amendment; it had been finally determined some eleven years prior.

Likewise, in *Brotherhood of Railroad Trainmen* v. *Denver and R. G. W. R. Co.*, 370 Fed. 2d 833 (Tenth Cir. 1966), at page 835, the Court said:

> "As we have earlier indicated, this action was *pending* before us on June 20, 1966, the effective date of Public Law 89-456. It is very clear that the judgment of the district court, regardless of its correctness when entered, must now be given *appellate* consideration in view of the amendments to the controlling statutes." (Emphasis supplied).

At page 7 of the present Petition for Certiorari, it is stated that retroactive application should be given to the 1966 amendment since the amendment was "procedural, only". It seems obvious, however, that attaching the right of appeal by an amendment in 1966 to an award which had become final under the prior law in 1955 goes beyond mere procedure.

In *United States* v. *Magnolia Petroleum Company*, 276 U.S. 160, 48 S. Ct. 236, 72 L. Ed. 509, there was involved the right of a taxpayer to have interest on a tax refund computed under a 1921 Statute more favorable to the taxpayer or under a 1924 Act more favorable to the government. At pages 511-512 of the L. Ed. citation, the Court said:

> "There is nothing to suggest that Sec. 1019 was intended to change the rule as to refunds *theretofore* allowed. The language employed shows the contrary. The words are 'upon the allowance of . . . a refund . . . interest shall be allowed . . . from the date of such tax . . . was paid.' Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions (163) unless the legislative purpose so to do plainly appears." (Emphasis supplied.)

This principle applies here. The "status" of petitioner's claim was "fixed" in accordance with the Railway Labor Act prior to the 1966 amendment in that his claim had been determined with finality.

II. THE PETITION FOR REVIEW OF THE AWARD OF THE NATIONAL RAILROAD ADJUSTMENT BOARD DID NOT STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

In the transcript of the proceedings before the First Division of the Adjustment Board, the relevant articles of the collective bargaining agreement and the operating rules under which the parties were operating were set forth.

Accordingly, as was said in *Edwards* v. *St. Louis-San Francisco Railroad Company,* 361 Fed. 2d 946 (7th Cir. 1966):

> "Appellant, therefore, cannot come before this or the district court complaining that the award of the Railroad Adjustment Board was based on insufficient evidence or that the Board incorrectly or wrongfully applied a provision of a collective bargaining agreement."

It was claimed in the courts below that the Board's award and the proceedings giving rise thereto effectively denied due process to petitioner. Answer to petitioner's contention that the matter was not heard on the merits—despite the fact that the submission contained items of evidence as well as arguments on the merits—and that the proceedings prior to submission to the Board were arbitrary, is found in *Edwards* v. *St. Louis-San Francisco Railroad Company,* 361 Fed. 2d 946 (1966), at page 954:

> "Therefore, when a railroad employee questions the propriety of the initial hearing held on carrier property, his claim must be based on the provisions of the collective bargaining agreement relating to that subject. In this case, appellant's due process claim put in Article 40 of the bargaining agreement and, more precisely, the words 'all witnesses' contained therein. The award of the Adjustment Board holding that Article 40 referred only to those witnesses under the control and direction of the carrier, as we have said, is not subject to review in federal court nor may this Court substitute its views as to the proper interpretation thereof."

If from 1955, the date of the award, petitioner had a right to review for deprivation of due process, then his petition is barred by the two-year provision of 45 U.S.C.A., Section 153 (q), as this statute was amended in 1934. If he did not have a right to review, then he is barred by the provision of Section 153 (m), which provides that the award shall be "final and binding upon both parties to this dispute . . . .".

Since it was claimed in the courts below that he was denied due process, he did have, during all those years, a right to review, which has been lost by the express two-year review provision as well as by laches. *Ellerd* v.

Southern Pacific Railroad Company, 241 Fed. 2d 541 (7th Cir. 1957), and the above case of *Edwards* v. *St. Louis-San Francisco Railroad Company*, 361 Fed. 2d 946 (7th Cir. 1966).

The 1966 amendment cannot, much less did it purport to, revive a right of review which had been lost by October 8, 1957.

It requires no citation of authority for the proposition that a constitutional right—a belated claim of lack of due process—can be lost by failure to plead it, failure to seek review, or any other act of waiver by way of laches. 16 *C.J.S.*, Constitutional Law, Section 89, page 263. See also *Gordon* v. *Eastern Airlines, Inc.*, 268 Fed. Supp. 210 (W.D., Va. 1967).

CONCLUSION

Respondent respectfully submits that the 1966 amendments to the Railway Labor Act could not, and did not, have the effect of permitting the revival of a 1955 award which was final and binding, for the purpose of a retroactive review. It is further submitted that petitioner is barred by the two-year statute of limitations, by laches, and that even under the 1966 amendment, no showing is made under the restricted right of review there given to future cases.

Accordingly, respondent respectfully asks that the Petition for Certiorari be denied.

Respectfully submitted,

HORACE E. GUNN
8 East Harrison Street
Danville, Illinois 61832
Attorney for Respondent—
Penn Central Company

GUNN, HICKMAN, KESLER, JENKINS & VOGEL
8 East Harrison Street
Danville, Illinois 61832
Of Counsel